Supreme Court, U.S.
FILED
AUG 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-159

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1987

THE OHIO CASUALTY INSURANCE COMPANY,
*Petitioner,*

VS.

DOWNEY SAVINGS AND LOAN ASSOCIATION,
*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SAPHIER AND REIN
MICHAEL S. SAPHIER, ESQ.
RICHARD A. WEISZ, ESQ.
1801 Century Park East
Suite 1720
Los Angeles, California 90067
(213) 556-0100

*Attorneys for Respondent Downey Savings and Loan Association*

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

## TABLE OF CONTENTS


| | Page |
|---|---|
| STATEMENT OF THE CASE | 1 |
| COUNTER-STATEMENT OF FACTS | 3 |
| OHIO'S PETITION SHOULD BE DENIED BECAUSE IT DOES NOT PRESENT ANY IMPORTANT QUESTION OF FEDERAL LAW | 7 |
| A. The Law of Insurance Bad Faith in California Was Clearly Defined | 8 |
| B. The Prerequisites for the Imposition of Punitive Damages in California Were Well-Established | 11 |
| C. There Were Reasonable Guidelines in California for Determining the Proper Amount of a Punitive Damages Award | 12 |
| D. The Law in Mississippi Governing Insurance Bad Faith and Punitive Damages is Substantially Different Than the Law in California | 14 |
| E. The California Court of Appeal Properly Concluded that Even if the Excessive Fines Clause of the Eighth Amendment Were Applicable to Civil Punitive Damages Awards, the Instant Award is not Excessive | 18 |
| F. The Punitive Damages Award Herein Does Not Violate the Excessive Fines Clause of the Eighth Amendment | 19 |
| G. OHIO's Argument That It Was Deprived of Due Process of Law Because It Was Subjected to Liability and Punitive Damages Under a Standard That Did Not Exist at the Time of OHIO's Wrongful Conduct Is Not Properly Before This Court | 21 |

TABLE OF CONTENTS

Page

H. OHIO's Argument that Due Process Requires that Defendants in Civil Tort Actions that Involve Punitive Damages Are Entitled to the Same Procedural Rights That Are Enjoyed by Defendants in Criminal Cases is Frivolous . . 23

CONCLUSION . . . . . 25

# TABLE OF AUTHORITIES

## Cases


Page

*Aetna Life Insurance Company v. Lavoie*, No. 84-1601 (April 22, 1986), 106 S.Ct. 1580 ..... 25

*Bankers Life and Casualty Co. v. Crenshaw*, No. 85-1765 (prob. juris. noted March 9, 1987) ..... 7, 8, 14, 15, 16, 21

*Bertero v. National General Corp.*, 13 Cal.3d 43, 118 Cal.Rptr. 184, 529 P.2d 608 (1974) ..... 11, 12

*Cardinale v. Louisiana*, 394 U.S. 437 (1969) ..... 22

*Chodos v. Insurance Company of North America*, 126 Cal.App.3d 86, 178 Cal.Rptr. 831 (1981) ..... 14

*City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) ..... 24

*CNA Casualty of California v. Seaboard Surety Company*, 176 Cal.App.3d 598, 222 Cal.Rptr. 276 (1986) ..... 9

*Comunale v. Traders & General Ins. Co.*, 50 Cal.2d 654, 328 P.2d 198 (1958) ..... 8

*Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967) ..... 23

*Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851) .. 18

*Delos v. Farmers Group, Inc.*, 93 Cal.App.3d 642, 155 Cal.Rptr. 843 (1979) ..... 14

*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal.App.3d 381, 202 Cal.Rptr. 204 (1984) ..... 12, 13

*Dewey v. Des Moines*, 173 U.S. 193 (1899) ..... 22

*District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) ..... 22

## Table Of Authorities

### Cases

Page

*Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 169 Cal.Rptr. 691, 620 P.2d 141 (1979) ..... 8, 11

*Ellis v. Dixon*, 348 U.S. 458 (1955) ..... 20

*Ferguson v. Skrupa*, 372 U.S. 726 (1963) ..... 24

*Finney v. Lockhart*, 35 Cal.2d 161, 217 P.2d 19 (1950) ..... 14

*Fletcher v. Western National Life Ins. Co.*, 10 Cal.App.3d 376, 89 Cal.Rptr. 78 (1970) ..... 8

*General Council v. Superior Court*, 439 U.S. 1369 (1978) ..... 8

*Gray v. Zurich Insurance Co.*, 65 Cal.2d 263, 54 Cal.Rptr. 104, 419 P.2d 168 (1966) ..... 9, 21, 22

*Gregory-Portland Independent School District v. United States*, 448 U.S. 1342 (1980) ..... 8

*Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 174 Cal.Rptr. 348 (1981) ..... 11

*Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973) ..... 8

*Hartford Accident & Indemnity Co. v. Civil Service*, 33 Cal.App.3d 26, 198 Cal.Rptr. 737 (1973) ..... 9

*Ingraham v. Wright*, 430 U.S. 651 (1977) ..... 20

*Kelly v. Robinson*, 479 U.S. ____, 93 L.Ed.2d 216, 107 S.Ct. 353 (1986) ..... 20

*Lowell v. Maryland Casualty Co.*, 65 Cal.2d 298, 54 Cal.Rptr. 116, 419 P.2d 180 (1966) ..... 9

*Malandris v. Merrill Lynch, Pierce, Fenner & Smith*, 703 F.2d 1152 (10th Cir. 1981), *cert. den.* 464 U.S. 824 (1983) ..... 23

## Table Of Authorities

### Cases


Page

*Massachusetts Bonding & Insurance Co. v. United States,* 352 U.S. 128 (1956) ..... 18

*Moore v. American United Life Ins. Co.,* 150 Cal.App.3d 610, 197 Cal.Rptr. 878, *mod.* 151 Cal.App.3d 766a (1984) ..... 12, 13, 14

*Neal v. Farmers Ins. Exchange,* 21 Cal.3d 910, 148 Cal.Rptr. 389, 582 P.2d 980 (1978) ..... 12, 14

*Pistorious v. Prudential Insurance Co.,* 123 Cal.App.3d 541, 179 Cal.Rptr. 660 (1981) ..... 12

*San Francisco Civil Service Ass'n. v. Superior Court of Marin County,* 16 Cal.3d 46, 127 Cal.Rptr. 131, 544 P.2d 1331 (1976) ..... 20

*Scott v. Donald,* 165 U.S. 58 (1897) ..... 23

*Silberg v. California Life Ins. Co.,* 11 Cal.3d 452, 113 Cal.Rptr. 711, 521 P.2d 1103 (1974) .....5, 8

*Silkwood v. Kerr-McGee,* 464 U.S. 238 (1984) ..... 20

*Smith v. Wade,* 461 U.S. 30 (1983) ..... 23

*Snelson v. Ondulando Highlands Corp.,* 5 Cal.App.3d 243, 85 Cal.Rptr. 806 (1970) .....20, 22

*Solem v. Helm,* 463 U.S. 277 (1983) .....18, 20

*Toole v. Richardson-Merrell, Inc.,* 251 Cal.App.2d 689, 60 Cal.Rptr. 398 (1967) ..... 23

*Walker v. Signal Companies, Inc.,* 84 Cal.App.3d 982, 149 Cal.Rptr. 119 (1978) ..... 12

*Webb v. Webb,* 451 U.S. 493 (1981) ..... 22

*Wetherbee v. United Ins. Co. of America,* 18 Cal.App.3d 266, 95 Cal.Rptr. 67 (1971) ..... 14

*Williamson v. Lee Optical,* 348 U.S. 483 (1955) .... 24

TABLE OF AUTHORITIES

CASES

Page

*Zhadan v. Downtown L.A. Motors,* 66 Cal.App.3d 481, 136 Cal.Rptr. 132 (1976) ..... 11

**United States Constitution**

Eighth Amendment .....7, 18, 19, 20, 23, 24

Fourteenth Amendment.....7, 21, 23

**California Statutes**

California Civil Code section 3294 .....11, 24

California Insurance Code section 790.03(h)(3) ... 4

California Insurance Code section 790.03(h)(5) ... 18

California Insurance Code section 790.07 ..... 19

No. 87-159

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1987

THE OHIO CASUALTY INSURANCE COMPANY,
*Petitioner,*

VS.

DOWNEY SAVINGS AND LOAN ASSOCIATION,
*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## STATEMENT OF THE CASE

This is an action for bad faith denial of insurance benefits brought by Downey Savings and Loan Association ("DOWNEY") against The Ohio Casualty Insurance Company ("OHIO"). OHIO's obligations to DOWNEY arose out of a savings and loan blanket bond that it sold to DOWNEY. The bond, in pertinent part, insured against any loss caused by the dishonest act of any employee of DOWNEY (CT 7034-7051). The bond also promised to defend or indemnify DOWNEY for any attorney's fees and costs incurred by DOWNEY in defending any lawsuit brought by a third party that arose

out of the dishonest act of any employee of DOWNEY (CT 7035).

DOWNEY claimed that one of its employees, a branch manager named Dennis McGrew ("McGrew"), participated in a conspiracy to bilk DOWNEY of hundreds of thousands of dollars. DOWNEY further claimed that the dishonest and fraudulent scheme was partially successful and directly resulted in a lawsuit against DOWNEY brought by a company known as American Funding Corporation ("AFC"). In defending the AFC lawsuit, DOWNEY incurred and paid attorney's fees and costs in the sum of $68,779.65 (CT 5156-5159). DOWNEY also paid AFC the sum of $55,000 to settle the AFC lawsuit (CT 5057-5110, 5367). DOWNEY claimed in the case at bar, in pertinent part, that (1) OHIO was obligated to reimburse DOWNEY for the attorney's fees and costs of $68,779.65 and the settlement sum of $55,000, together with prejudgment interest on said sums from the dates they were paid by DOWNEY, and (2) OHIO acted maliciously and in bad faith in connection with its handling and denial of DOWNEY's insurance claim.

The jury's verdict awarded DOWNEY $152,983.43 in compensatory damages and $5,000,000 in punitive damages (CT 4221, 4254-4255).

OHIO filed a motion for judgment notwithstanding the verdict, a motion for new trial and a motion for remittitur of the punitive damages award. On February 28, 1984, after exhaustive briefing and oral argument, the trial judge denied all three motions (CT 4548-4553).

OHIO appealed from the judgment against it. On February 26, 1987, the Court of Appeal of the State of California, Second Appellate District ("California Court of Appeal") filed its unanimous decision in which it

affirmed the jury's verdict in its entirety (Petition, App. A, at 1a-31a). OHIO filed a Petition for Rehearing in the California Court of Appeal which was denied on March 17, 1987 (Petition, App. B, at 32a). OHIO filed a Petition for Review in the California Supreme Court which was denied on May 27, 1987 (Petition, App. D, at 36a).

On May 29, 1987, OHIO filed in the California Court of Appeal a Motion for Stay of Issuance of Remittitur Pending Writ of Certiorari to the United States Supreme Court. That motion was denied, without opinion, on June 15, 1987. On June 17, 1987, OHIO filed an Application for Stay in this Court. On June 19, 1987, that Application was denied, without opinion, by Justice O'Connor. Thereafter, OHIO satisfied the judgment that was entered on the jury's verdict.

## COUNTER-STATEMENT OF FACTS

OHIO's statement of facts repeatedly misstates and distorts the evidence that supports the jury's verdict and award of punitive damages. An accurate summary of the salient facts relating to both DOWNEY's fidelity bond claim based on its employee's dishonesty and OHIO's bad faith and malicious handling of DOWNEY's insurance claim is set forth in the opinion of the California Court of Appeal which is reproduced as Appendix A to the Petition for Writ of Certiorari (See Petition, App. A, at 2a-8a and 23a-29a).

It must be emphasized, however, that the jury's $5,000,000 punitive damages award is firmly grounded in the evidence adduced at trial that established that OHIO knowingly and deliberately conceived and engaged in a dishonest claims process that was designed to deny valid claims and take advantage of *all* policyholders. In this

regard, OHIO did the following in order to cheat DOWNEY out of the benefits of its policy:

1. Failed to conduct a reasonable, adequate, complete or good faith investigation. Though OHIO was thoroughly familiar with the requirements for the proper handling of insurance claims, including the requirements of California Insurance Code section 790.03(h)(3) that required OHIO to handle all insurance claims in a prompt, fair and equitable manner and the similar requirements of OHIO's own Claims Manual, OHIO: (a) did not conduct an investigation upon or within a reasonable time after three separate notices of the occurrence were given to it; (b) conducted whatever investigation was made, once it started, in a dilatory and haphazard manner that did not conform to either the requirements of California Insurance Code section 790.03(h)(3) or its own purported policies and procedures; (c) did not attempt to establish whether it was more likely than not that McGrew was dishonest in connection with his conduct that was the subject of DOWNEY's insurance claim and, in this regard, failed to interview McGrew or any of the other persons involved in the transaction; and (d) systematically excluded from its investigation any facts and information that could be of benefit to the insured and support the insured's claim;[1]

---

[1]A striking example of such facts and information that were deliberately ignored by OHIO was the sworn testimony of Steven Duane Jones that was received by OHIO on or about October 31, 1977 (CT 4929-4950) that unequivocally fingered McGrew as the "inside man" in the criminal conspiracy (CT 4919-4950; RT 1492:5-1494:10). After reviewing a copy of the transcript of Jones' sworn testimony, OHIO took the incredible position that it did not consider Jones' sworn testimony to be "hard" evidence of dishonesty on McGrew's part, and it did not have to conduct any further investigation or pay the attorney's fees incurred by DOWNEY in defending the AFC

2. Conducted a dishonest and unfair investigation with the express primary purpose of discovering facts that would enable OHIO to defeat the insurance claim in direct violation of OHIO's duty as an insurer "to give the interests of the insured at least as much consideration as it gives to its own interests." *Silberg v. California Life Ins. Co.,* 11 Cal.3d 452, 460, 113 Cal.Rptr. 711, 521 P.2d 1103 (1974). As the California Court of Appeal noted in its opinion (Petition, App. A, at 27a), this conduct was part of OHIO's "standard procedure" for handling insurance claims. In accordance with this claims handling policy and procedure, and with the express knowledge that it would be unreasonable for OHIO to conduct an investigation in a manner that was designed to discover facts to defeat the claim of the insured, OHIO instructed, in writing, its claims manager and claims adjuster to "keep OHIO's defenses against a claim that was or could be asserted by DOWNEY in the forefront of OHIO's investigation" (CT 4864);

3. Created false and fraudulent written documents with the express intent of fabricating defenses to DOWNEY's insurance claim. OHIO created two such fraudulent documents upon forming the opinion that there was the possibility that McGrew was the "inside man" in the fraudulent scheme to defraud DOWNEY of $100,000 and that there was the possibility of a loss that would be covered by the bond, to wit: (a) a letter from OHIO to DOWNEY dated May 29, 1975 that falsely stated that the first notice OHIO received of the occurrence that could lead to liability under the bond was on May 19, 1975 (CT 4858). The purpose of advising DOWNEY of the May 19, 1975 date was to set up OHIO's defense of late notice to a

---

lawsuit because it didn't "believe" Jones (CT 4951-4952; RT 1540:20-1542:8, 1901:22-1902:20).

claim under the bond. OHIO knew the May 29, 1975 letter contained false information but did nothing to correct it (Petition, App. A, at 6a); and (b) a report dated September 16, 1975 prepared by OHIO's claims adjuster that falsely stated that an investigator for the District Attorney's office told him that he believed that McGrew was innocent of any wrongdoing or complicity in the criminal scheme (CT 6907-6910; RT 2613:12-24, 2616:12-2617:9). This fraudulent report was prepared by the claims adjuster shortly after he received written instructions to "keep all possible defenses in the forefront of the investigation" (RT 2612:24-2614:14; Petition, App. A, at 7a);

4. Used the right to notice and take depositions for the improper purpose of "harassing, embarrassing, inconveniencing and causing expense" to insureds in order to "create a climate for settlement" pursuant to the written policy set forth in OHIO's Claims Manual (CT 5530; RT 1602:2-1605:25, 1877:21-28; Petition, App. A, at 27a);

5. Knowingly and intentionally applied improper standards for proof of insurance claims. In this regard, OHIO required DOWNEY to obtain a *confession* or *admission of guilt* from McGrew before it would pay DOWNEY's insurance claim (RT 1533:10-1540:11, 1833:1-28, 1837:22-1839:3) even though OHIO knew that it was obligated to pay DOWNEY's fidelity loss once it was established that it was more likely than not that McGrew had committed a dishonest act that resulted in a loss to DOWNEY (RT 1286:17-1827:17; Petition, App. A, at 7a); and

6. Failed to indemnify DOWNEY for its attorney's fees incurred in defending the AFC lawsuit even *after* OHIO knew there was a potential for liability under the policy and had concluded that it had an absolute obligation to do so (RT 1285:26-1287:17, 1771:24-1773:10, 1850:20-24, 1856-A:12-22, 1921:12-21).

It is respectfully submitted that the record in this case is replete with evidence that supports the jury's verdict and explains why (a) the trial court denied OHIO's post trial motions for judgment notwithstanding the verdict, new trial and remittitur, (b) the California Court of Appeal unanimously affirmed the judgment and (c) the California Supreme Court denied OHIO's Petition for Review.

## OHIO'S PETITION SHOULD BE DENIED BECAUSE IT DOES NOT PRESENT ANY IMPORTANT QUESTION OF FEDERAL LAW

In an effort to persuade this Court that its petition for writ of certiorari presents an important question of federal law, OHIO has tried to make it appear that the instant case raises the same constitutional issues that are now before the Court in *Bankers Life and Casualty Co. v. Crenshaw,* No. 85-1765 (prob. juris. noted March 9, 1987). OHIO claims, in essence, that the law in California regarding the tort of insurance bad faith and the awarding of punitive damages is virtually identical to the petitioner's version of Mississippi law in *Bankers Life.* OHIO argues that California's civil punitive damages law, like Mississippi's, violates the Eighth and Fourteenth Amendments because it does not contain any standards which limit such awards to reasonable amounts and does not afford civil defendants the protections that are enjoyed by defendants in criminal cases. OHIO also claims that the defendant herein, like the defendant in *Bankers Life*, was subjected to punitive damages on the basis of a newly formulated and retrospectively applied legal standard that governs an insurer's obligations to its insured.

DOWNEY submits that OHIO's attempt to equate this case with *Bankers Life* rests on a distortion of the record,

a misrepresentation of relevant California law, and a fabrication of the issue of the purported newly formulated legal standard concerning the duty owed by an insurer to its insured. The factual record, legal determinations and California law at issue herein are fundamentally different from those in the *Bankers Life* case.[2]

### A. The Law of Insurance Bad Faith in California Was Clearly Defined.

In California, an insurer may be subject to liability in tort when it "unreasonably and in bad faith" violates the obligations it owes to an insured. *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 818-823, 169 Cal.Rptr. 691, 620 P.2d 141 (1979); *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 573-574, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973); *Fletcher v. Western National Life Ins. Co.*, 10 Cal.App.3d 376, 401-402, 89 Cal.Rptr. 78 (1970). Such tortious bad faith has been found where, as here, an insurer (a) fails to properly investigate its insured's claim, *Egan v. Mutual of Omaha Ins. Co., supra*; (b) fails to give as much consideration to the welfare of its insured as it gives to its own interests, *Silberg v. California Life Ins. Co., supra; Comunale v. Traders & General Ins. Co.*, 50 Cal.2d 654, 660-661, 328 P.2d 198 (1958); (c) unreasonably and in bad faith withholds payment on a valid claim of its insured, *Egan v. Mutual of Omaha Ins. Co., supra; Gruenberg v. Aetna Ins. Co., supra; Fletcher v. Western National Life Ins. Co., supra*; and (d) in bad faith, breaches its duty to defend or indemnify an insured when

---

[2]The denial of OHIO's Application for Stay of execution on the judgment reinforces the conclusion that OHIO's petition does not present any substantial federal question and should be denied. *General Council v. Superior Court*, 439 U.S. 1369, 1373-1374 (1978); *Gregory-Portland Independent School District v. United States*, 448 U.S. 1342 (1980).

there is a potential for liability under the insurance policy, *Gray v. Zurich Insurance Company*, 65 Cal.2d 263, 275-276, 54 Cal.Rptr. 104, 419 P.2d 168 (1966); *CNA Casualty of California v. Seaboard Surety Company*, 176 Cal.App.3d 598, 605-609, 222 Cal.Rptr. 276 (1986).

In California, an insurer's duty to either defend or indemnify an insured for its reasonable attorney's fees and costs incurred in defending a lawsuit arises whenever the insurer ascertains facts from any source which give rise to the potential for liability under the insurance policy. *Gray v. Zurich Insurance Co., supra; Hartford Accident & Indemnity Co. v. Civil Service*, 33 Cal.App.3d 26, 34, 198 Cal.Rptr. 737 (1973); *Lowell v. Maryland Casualty Co.*, 65 Cal.2d 298, 300-302, 54 Cal.Rptr. 116, 419 P.2d 180 (1966); *CNA Casualty of California v. Seaboard Surety Company, supra*. The law in this state has been abundantly clear on this point since *Gray v. Zurich* was decided in 1966. Further, and perhaps most significantly, OHIO at all times had a clear and correct understanding of the applicable California law (RT 1285:26-1287:17, 1771:24-1773:10, 1850:20-24, 1856-A:12-22, 1921:12-22). OHIO's contention that it was penalized pursuant to a newly formulated legal standard that did not exist and to which it could not reasonably have been expected to conform at the time the alleged wrongful conduct occurred is a false and misleading statement of both pertinent California law and its express knowledge and understanding of pertinent California law.[3]

---

[3]The trial court ruled on DOWNEY's motion for summary adjudication of the issues that (a) on October 31, 1977, OHIO indisputably was aware of facts which created a potential for liability under the bond and (b) OHIO, therefore, was contractually obligated to indemnify DOWNEY for the attorney's fees incurred in defending the AFC

Moreover, the duty to indemnify contained in the fidelity bond's defense clause required OHIO to *either* (a) defend the AFC lawsuit for DOWNEY through attorneys of OHIO's choice or (b) indemnify DOWNEY for its reasonable attorney's fees and costs incurred in defending the AFC lawsuit (CT 7035; Petition, App. A, at 2a). The defense clause did not relieve OHIO of its unequivocal obligation to provide the insured with a defense at the insurer's expense once it became clear that there was a potential for liability under the insurance policy. Nor did it require the insurer to indemnify the insured for the ultimate loss caused by the dishonest act of the insured's employee. The duty to indemnify contained in the defense clause is thus part of the insurer's duty to provide a defense for the insured rather than part of the separate duty to indemnify once the loss has been incurred and liability has been established.

---

lawsuit from that date forward (CT 2709-2711). The compensatory damages award was, in pertinent part, based on this ruling.

By contrast, OHIO's bad faith and malicious conduct upon which the punitive damages award was based included (a) failing to conduct a reasonable, adequate, complete or good faith investigation, (b) conducting a dishonest and unfair investigation with the express primary purpose of discovering facts that would enable OHIO to defeat the insurance claim, (c) creating fraudulent documents in order to fabricate defenses to DOWNEY's insurance claim, (d) using the right to notice and take depositions for the improper purpose of harassing, embarrassing, inconveniencing and causing expense to insureds in order to create a climate for settlement and (e) knowingly and intentionally applying improper standards for the proof of insurance claims. Contrary to the unspoken assumption contained in OHIO's argument, there is no evidence or reason to believe that the jury's punitive damages award was based principally upon OHIO's failure to indemnify DOWNEY for its attorney's fees.

## B. The Prerequisites for the Imposition of Punitive Damages in California Were Well-Established.

Before punitive damages can be assessed in an insurance bad faith case in California, there must be a determination, as there was in this case, that the insurer (a) acted wrongfully in violation of a duty it owed to its insured, (b) acted unreasonably (in bad faith) in violating the duty it owed to its insured, *and* (c) acted with oppression, fraud or malice when it violated the duty it owed to its insured.[4] *Egan v. Mutual of Omaha Ins. Co., supra.*

The statutory requirement that the defendant must be found to have acted with oppression, fraud, *or* malice before punitive damages may be awarded is designed to limit the situations in which such damages may be imposed. California courts have consistently held that the statutory standards set forth in California Civil Code section 3294 are not unconstitutionally vague and provide sufficient guidance for the trial courts charged with implementing it. *Bertero v. National General Corp.,* 13 Cal.3d 43, 66, fn. 13, 118 Cal.Rptr. 184, 529 P.2d 608 (1974); *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 811-812, 174 Cal.Rptr. 348 (1981); *Zhadan v. Downtown L.A. Motors*, 66 Cal.App.3d 481, 501-502, 136 Cal.Rptr. 132 (1976); *Egan v. Mutual of Omaha Ins. Co., supra,* 24 Cal.3d at 819-820. In the case at bar, the California Court of Appeal expressly held that there was substantial evidence from which the jury could reasonably have found

---

[4]California Civil Code section 3294 provides: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

that OHIO acted maliciously with an intent to oppress *and* in conscious disregard of the rights of its insured, thus entitling DOWNEY to punitive damages (Petition, App. A, at 25a).

### C. There Were Reasonable Guidelines in California for Determining the Proper Amount of a Punitive Damages Award.

With respect to determining the amount and the propriety of the amount of a punitive damages award, California law provides that punitive damages must be free from passion or prejudice, and that there is a range of reasonableness for punitive damages that reflects the reprehensibility of the defendant's conduct, the financial condition of the defendant, a reasonable relationship between the actual damages suffered and the punitive damages award, and the need to punish and deter the reoccurrence of the wrongful conduct. *Walker v. Signal Companies, Inc.,* 84 Cal.App.3d 982, 998, 149 Cal.Rptr. 119 (1978); *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.,* 155 Cal.App.3d 381, 390, 202 Cal.Rptr. 204 (1984); *Neal v. Farmers Ins. Exchange,* 21 Cal.3d 910, 927-929, 148 Cal.Rptr. 389, 582 P.2d 980 (1978); *Bertero v. National General Corp., supra,* 13 Cal.3d at 65; *Moore v. American United Life Ins. Co.,* 150 Cal.App.3d 610, 636-637, 197 Cal.Rptr. 878, *mod.* 151 Cal.App.3d 766a (1984); *Pistorious v. Prudential Insurance Co.,* 123 Cal.App.3d 541, 554, 179 Cal.Rptr. 660 (1981).

In the case at bar, the California Court of Appeal emphasized that the critical factors to be considered in accomplishing the purpose of punitive damages of punishing the defendant and deterring the reoccurrence of the wrongful conduct are (1) the reprehensibility of the conduct of the defendant and (2) the wealth of the defendant. The more reprehensible the conduct of the

defendant, the larger the amount of the punitive damages award must be to accomplish the objectives of such awards; similarly, the wealthier the defendant, the larger the award must be. The California Court of Appeal correctly held that the jury's award of punitive damages was free from passion or prejudice and was justified by the reprehensibility of OHIO's conduct, the wealth of the defendant, the fact that OHIO's "invidious practices" affected other insureds besides DOWNEY, and the need to punish and deter the reoccurrence of the wrongful conduct (Petition, App. A, at 23a-29a).

The evidence also established that the amount of the punitive damages award in the case at bar is reasonably related to the wealth and net worth of OHIO. The punitive damages award represented (1) less than 1% of OHIO's net assets, (2) approximately 3/10ths of 1% of its gross assets, and (3) 3.64 weeks of OHIO's annual net income after payment of taxes (CT 5165-5284; Petition, App. A, at 28a-29a). *Moore v. American United Life Ins. Co., supra,* 150 Cal.App.3d at 642.

An examination of prior cases and the cases collected in the appendix to the opinion in *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc., supra,* demonstrate that the present award, involving a ratio between punitive and compensatory damages of approximately 32.7:1, is well within the historical framework described in *Devlin* and not excessive as a matter of law when compared to what other California appellate courts have approved. In *Moore v. American United Life. Ins. Co., supra,* for instance, the court of appeal approved a jury award of $2,500,000 in punitive damages and $30,000 in compensatory damages, a ratio of 83:1. The *Moore* court reasoned that a substantial punitive damages award is justified when the jury hears evidence of fraudulent claims practices potentially

affecting numerous insureds other than the plaintiff. *Moore, supra,* 150 Cal.App.3d at 636-637.[5]

OHIO cannot credibly deny that California has well-developed principles and standards governing the tort of insurance bad faith and the imposition of punitive damages. Indeed, the essence of OHIO's arguments in its motions for judgment notwithstanding the verdict, new trial and remittitur, its appeal to the California Court of Appeal and its Petition for Review to the California Supreme Court was that the jury's punitive damages award violated the very standards it now claims did not exist.

Nor does OHIO deny that the jury was instructed in accordance with the above-described guidelines for when punitive damages may be awarded and how the amount shall be determined. In this regard, OHIO did not object to any of the trial court's proposed jury instructions that concerned these matters (RT 3357:4-14, 3409:8-3413:25).

### D. The Law in Mississippi Governing Insurance Bad Faith and Punitive Damages is Substantially Different Than the Law in California.

Sprinkled throughout OHIO's petition are references to this Court's note of probable jurisdiction in *Bankers*

---

[5]For additional California cases with ratios between punitive and compensatory damages in excess of 32.7:1 in which the appellate courts have affirmed the punitive damages awards as falling within the "range of reasonableness," please see *Neal v. Farmers Ins. Exchange, supra; Wetherbee v. United Ins. Co. of America,* 18 Cal.App.3d 266, 95 Cal.Rptr. 67 (1971); *Chodos v. Insurance Company of North America,* 126 Cal.App.3d 86, 178 Cal.Rptr. 831 (1981); *Delos v. Farmers Group, Inc.,* 93 Cal.App.3d 642, 663-668, 155 Cal.Rptr. 843 (1979); *Finney v. Lockhart,* 35 Cal.2d 161, 217 P.2d 19 (1950).

*Life and Casualty Co. v. Crenshaw, supra,* and the notion that the instant case raises the same federal questions that are asserted in the *Bankers Life* case. This simply is not true.

The threshold question presented in *Bankers Life* concerns the constitutionality of a Mississippi statute which automatically imposed a mandatory penalty of 15% of the money judgment upon the unsuccessful defendant-appellant, Bankers Life, irrespective of the merit of the appeal and whether or not the appeal was frivolous (See Jurisdictional Statement filed by Bankers Life, App. A, at i). The case at bar does not involve any comparable or similar statute.

Moreover, in Mississippi, in order to assess punitive damages, there need only be a finding that the insurer wrongfully failed to pay a valid insurance claim. By contrast, before punitive damages can be assessed in California there must be findings that (a) the insurer acted wrongfully in violating a duty it owed to its insured, (b) the insurer acted unreasonably (in bad faith) in violating a duty it owed to its insured, *and* (c) the insurer acted with oppression, fraud or malice when it violated a duty it owed to its insured. Indeed, the absence of a requirement that the insured prove that the insurer's wrongful conduct was grossly negligent, reckless, malicious or intentional generated the argument that a different and lesser standard for the imposition of punitive damages was created and applied in the *Bankers Life* bad faith insurance case than was required generally in other civil cases in Mississippi. Unlike the undeveloped and unsettled law of bad faith insurance in Mississippi, the law in California was clearly defined, fair and specific at all material times.

In the instant case, substantial evidence supports the jury's verdict, the trial judge's denial of OHIO's motion for remittitur and the opinion of the California Court of Appeal to the effect that "OHIO acted maliciously, with an intent to oppress, *and* in conscious disregard of the rights of its insured" (Petition, App. A, at 23a-29a). On the other hand, in the *Bankers Life* case, the jury and the Mississippi Supreme Court only found that Bankers Life acted wrongfully in failing to pay Crenshaw's insurance claim. The jury did not find, nor was it required to find under Mississippi law, that Bankers Life acted unreasonably (in bad faith), oppressively *or* maliciously when it handled and failed to pay Crenshaw's insurance claim.

In addition, once it was determined in *Bankers Life* that the imposition of punitive damages was appropriate, the wealth of the defendant was the only criterion the jury was required to consider in determining the amount of the punitive damages award. By contrast, in California the specific guidelines for determining the amount of the punitive damges award included (a) the nature and extent of the reprehensible conduct of the defendant, (b) the financial condition of the defendant, and (c) the ratio between punitive and compensatory damages had to be within a "range of reasonableness." In this regard, the evidence in the instant case established that OHIO adopted and implemented a systematic company and nationwide policy and procedure of denying valid insurance claims. Thus, the case at bar does not involve a mistake, gross negligence or mere reckless decision making in failing to pay an insurance claim. Rather, it involves actual, insidious fraud that permeated the entire claims handling process of the insurance carrier.

Finally, in the *Bankers Life* case, the trial judge erroneously believed and ruled that he did not have the power to

reduce the jury's punitive damages award. Bankers Life argued on appeal that it was denied the right to have the trial judge who was familiar with the evidence dispassionately evaluate the jury's verdict to determine if it was the result of passion or prejudice. In the instant case, the trial judge did dispassionately review the evidence on the defendant's motions for remittitur, judgment notwithstanding the verdict and new trial. He concluded that the punitive damages award was not excessive, was supported by the evidence, was not the product of passion or prejudice and was the product of a "sober" jury (CT 4548-4563; Petition, App. A, at 28a-29a).

In the case at bar, the California Court of Appeal unquestionably recognized its power and duty to reduce excessive punitive damages awards. However, after conducting its own independent review of the record and applying the guidelines for the imposition of punitive damages to the extraordinary facts of this case, the California Court of Appeal determined that the punitive damages award was neither excessive nor the result of passion or prejudice (Petition, App. A, at 23a-29a).

It is ironic that OHIO claims that there were insufficient standards for the imposition of punitive damages in California and that it was denied meaningful appellate review of the punitive damages award. In the Brief of Appellant filed in the Mississippi Supreme Court, Bankers Life cited California as a model of a state that properly defined both the role of an appellate court in reviewing a punitive damages award and the factors to be considered in determining the amount of a punitive damages award (See Jurisdictional Statement filed by Bankers Life, App. A, at 128a and 132a). It is California's well-developed, clearly defined, fair and understandable guidelines for the imposition of punitive damages that sets it

apart from states like Mississippi where the development of bad faith insurance law is in its incipient stages.

### E. The California Court of Appeal Properly Concluded that Even if the Excessive Fines Clause of the Eighth Amendment Were Applicable to Civil Punitive Damages Awards, the Instant Award is Not Excessive.

OHIO's argument that the Eighth Amendment applies to civil punitive damages ignores the conclusion of the California Court of Appeal that, even if that were the case, the instant award is not excessive:

> "OHIO claims the punitive damage award violates the Eighth Amendment's prohibition against the imposition of excessive fines. We have already concluded the award is not excessive as a matter of law." Petition, App. A, at 30a.

OHIO's focus on the mathematical ratio between the size of the punitive damages award and the compensatory damages award is, for the purposes of the Eighth Amendment, irrelevant. The sole concern of the Eighth Amendment is whether the penalty is disproportionate to the severity of the misconduct. *Solem v. Helm*, 463 U.S. 277, 284 (1983); *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851). In *Massachusetts Bonding & Insurance Co. v. United States*, 352 U.S. 128, 133 (1956), the Court emphasized that "[b]y definition, punitive damages are based upon the degree of the defendant's culpability," and specifically recognized the propriety of large punitive damages awards "[w]here the degree of fault is high, but the pecuniary injury slight."

OHIO's argument that the award herein is excessive because violations of California Insurance Code section 790.03(h)(5) are punishable by a maximum monetary fine

of $500 under section 790.07 fails to mention that the fine only applies to proceedings brought by the insurance commissioner for a violation of a cease and desist order. California Insurance Code section 790.07 does not prohibit or limit a victimized insured from recovering his provable compensatory damages (as well as punitive damages) in a bad faith tort action where, as here, the evidence of the insurer's tortious bad faith reveals a scope and pattern of outrageous and flagrant acts that extends well beyond the mere violation of a regulatory statute or breach of an express or implied covenant of an insurance contract.

The punitive damages award in the case at bar was imposed under California's well-established, clearly defined, and reasonable principles and standards that govern (a) the obligations owed by an insurer to its insured, (b) the circumstances under which punitive damages may be awarded, and (c) the determination of the amount of such awards. The instant award was set at an amount which plainly serves to punish OHIO for the manner in which it handled DOWNEY's insurance claim and to discourage the continuation of its invidious claims practices. DOWNEY, therefore, submits that the lower courts properly determined that the punitive damages award herein is not "excessive" under the Eighth Amendment even if it did apply to civil tort actions.

## F. The Punitive Damages Award Herein Does Not Violate the Excessive Fines Clause of the Eighth Amendment.

OHIO's broad contention that punitive damages awards in civil tort actions are subject to the Excessive Fines Clause of the Eighth Amendment misconstrues the reach of the Amendment and is unsupported by either

history or judicial precedent.[6] This Court has already examined the history of the Eighth Amendment and concluded that its prohibitions were intended to apply only to criminal proceedings. *Ingraham v. Wright,* 430 U.S. 651, 664-666 (1977); *Solem v. Helm, supra,* 463 U.S. at 284, fn. 8.

Punitive damages awards in civil tort actions are part of the state's remedial system for the enforcement of important rights. *San Francisco Civil Service Ass'n. v. Superior Court of Marin County,* 16 Cal.3d 46, 49-50, 127 Cal.Rptr. 131, 544 P.2d 1331 (1976). As this Court has recognized, "[p]unitive damages have long been a part of traditional state tort law" (*Silkwood v. Kerr-McGee,* 464 U.S. 238, 255 (1984)), and are a system of "wholly private penalties. . . ." that are designed and intended to remedy purely private wrongs. *Kelly v. Robinson,* 479 U.S. ____, 93 L.Ed.2d 216, 229, fn. 13, 107 S.Ct. 353, 361-362, fn. 13 (1986). Because punitive damages have historically been regarded as a civil penalty, and are not imposed in proceedings which bear the attributes of criminal law or which subject the wrongdoer to possible imprisonment or stigmatization associated with a conviction, they do not constitute a criminal penalty subject to the Eighth Amendment. *Ingraham v. Wright, supra.*

---

[6]It should also be pointed out that while OHIO asserted numerous affirmative defenses to the Complaint in its Answer (CT 126-143), OHIO did not assert any defense based on Eighth Amendment grounds. OHIO urged this position for the first time on appeal, notwithstanding California's well-established rule against such practice. *Snelson v. Ondulando Highlands Corp.,* 5 Cal.App.3d 243, 259, 85 Cal.Rptr. 806 (1970). Consequently, OHIO's Eighth Amendment argument was not properly raised or decided in accordance with California law and is not properly before this Court. *Ellis v. Dixon,* 348 U.S. 458, 459-464 (1955).

### G. OHIO's Argument that It Was Deprived of Due Process of Law Becaue It Was Subjected to Liability and Punitive Damages Under a Standard That Did Not Exist at the Time of OHIO's Wrongful Conduct Is Not Properly Before This Court.

OHIO never relied in the trial court or the California Court of Appeal on the Due Process Clause of the Fourteenth Amendment or any other constitutional provision in support of its claim that an insurer's obligation to indemnify its insured for defense costs is governed under a different or lower standard than the one set forth in *Gray v. Zurich, supra,* and its progeny, and that the application of the *Gray v. Zurich* standard to the obligations OHIO owed to DOWNEY constitutes a new standard that did not previously exist. This argument was made on the basis of and limited to matters of contractual interpretation and state law. OHIO has attempted to recast this argument in constitutional terms in this Court in an effort to force it into the formula used in *Bankers Life* and manufacture a "substantial federal question."

While OHIO did raise a Fourteenth Amendment argument in its trial court pleadings and briefs to the California Court of Appeal, that argument was confined to the claim that OHIO was not afforded the protections available to defendants in criminal proceedings (Petition, App. A, at 30a). Otherwise, OHIO did not identify a single procedural safeguard which it now contends it was denied. In this regard, OHIO did not claim that it was denied constitutionally required fair notice of the rules of procedure or standards of adjudication that governed the obligations it owed to its insureds.

OHIO had ample opportunity to assert its claim in the trial court and before the California Court of Appeal that the application of the standard first enunciated in *Gray v.*

*Zurich* to its conduct in this case deprived it of Due Process of law. However, OHIO did not object to the trial court's proposed jury instructions on constitutional grounds (CT 4179-4183; RT 3357:4-14, 3409:8-3413:25) and, similarly, did not raise any constitutional complaint about this matter before the California Court of Appeal.[7] Having failed to raise this jury trial issue either at the trial level or in its briefs filed in the California Court of Appeal, OHIO is barred and foreclosed from raising it at this late date. *Snelson v. Ondulando Highlands Corp., supra,* 5 Cal.App.3d at 259.

This Court has repeatedly ruled that it cannot and will not "decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969); *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 482, fn. 16 (1983); *Webb v. Webb,* 451 U.S. 493, 499 (1981). And while the Court has recognized that a party may enlarge upon a particular federal question raised in the lower court, the "enlargement" doctrine does not permit a litigant to raise issues that were not "necessarily connected" to the questions presented below "so that the state court could not have given judgment (on the questions that were raised) without deciding it." *Dewey v. Des Moines,* 173 U.S. 193, 198-199 (1899). The California Court of Appeal decided every question that was raised below without "necessarily" deciding the Due Process

---

[7]The sole objection made by OHIO to the proposed jury instructions that relate to an insurer's duty to either defend or indemnify an insured for its defense costs was confined to the erroneous and discredited claim that General Agreement "C" of the fidelity bond only required an insurer to defend or indemnify an insured for defense costs when the third party's complaint alleged a loss that was caused by employee dishonesty (RT 3409:25-3411:13).

question that OHIO now urges in its petition. Accordingly, that question is not properly before this Court.

### H. OHIO's Argument that Due Process Requires that Defendants in Civil Tort Actions that Involve Punitive Damages Are Entitled to the Same Procedural Rights That Are Enjoyed by Defendants in Criminal Cases is Frivolous.

OHIO's attempt to persuade this Court that defendants exposed to punitive damages in civil tort actions are entitled to all of the rights afforded defendants in criminal proceedings ignores the fact that this Court has consistently confirmed the constitutionality of punitive damages adjudicated in traditional civil proceedings and has *never* ruled that an award of punitive damages so adjudicated violates the Due Process Clause of the Fourteenth Amendment, the Eighth Amendment, or any other constitutional provision. *Scott v. Donald*, 165 U.S. 58, 68 (1897); *Smith v. Wade*, 461 U.S. 30, 35 (1983).

The cases have uniformly held that an "award of penal damages made under civil rules of procedure (does) not violate any constitutional right" of the party against whom the award is made. *Toole v. Richardson-Merrell, Inc.*, 251 Cal.App.2d 689, 717, 60 Cal.Rptr. 398 (1967); *Curtis Publishing Company v. Butts*, 388 U.S. 130, 159 (1967); *Smith v. Wade, supra; Malandris v. Merrill Lynch, Pierce, Fenner & Smith*, 703 F.2d 1152, 1173 (10th Cir. 1981), *cert. den.* 464 U.S. 824 (1983).

OHIO's challenge to the civil administration of tort actions involving punitive damages also overlooks and ignores the rule developed by this Court that state statutes not involving suspect classifications or impinging on fundamental rights are "presumed to be valid and will be sustained if the classification drawn by the statute is

rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). See *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955); *Ferguson v. Skrupa*, 372 U.S. 726, 728-732 (1963). As demonstrated above, California's statutory punitive damages provision, California Civil Code section 3294, constitutes part of the state's remedial system for the enforcement of important rights. The statute and interpreting state court decisions manifest well-established and clearly defined guidelines for the imposition of punitive damages in civil tort actions and are "rationally related" to the historic and legitimate purposes served by punitive damages. Thus, California's civil administration of punitive damages in tort actions comports with Due Process and OHIO is not entitled to convert this civil action into a criminal proceeding.

Moreover, as noted by the California Court of Appeal, OHIO's Due Process argument is defective because OHIO never identified in the courts below a single procedural safeguard which it now contends it was denied (Petition, App. A, at 30a). OHIO did not claim that it was denied an opportunity to be heard, or that traditional notions of fair play were not applied, or that articulated rules of procedure and standards of adjudication were not followed. Rather, OHIO's claim that criminal rules of procedure should be applied to a civil proceeding is simply its Eighth Amendment claim in masquerade. The argument is no more compelling in this guise. Indeed, OHIO's claim that the application of criminal safeguards would prevent excessive punitive damages awards is irrelevant in this case since the lower courts have ruled that the instant award is not excessive in fact or law. Thus, it is unnecessary to even consider OHIO's claim because it would not affect the award in this case.

## CONCLUSION

The lower courts applied the well-developed and reasonable standards of California law governing punitive damages to the facts of this case and determined that the punitive damages award in this case was not excessive. In addition, this case does not involve the retrospective imposition of punitive damages under a new cause of action, and OHIO did not properly raise this issue below. Nor does this case involve any statute that imposes a penalty on any person who unsuccessfully appeals an adverse money judgment.

For the foregoing reasons, OHIO's petition for writ of certiorari does not raise any important question of federal law and does not present an "appropriate setting" to consider the constitutional issues referred to in former Chief Justice Burger's concluding comments in *Aetna Life Insurance Company v. Lavoie,* No. 84-1601 (Apr. 22, 1986) slip op., at 13, 106 S.Ct. 1580, 1589 (1986). Accordingly, it is respectfully submitted that the petition for writ of certiorari should be denied.

DATED: August 18, 1987.

SAPHIER AND REIN
MICHAEL S. SAPHIER
RICHARD A. WEISZ

By MICHAEL S. SAPHIER, Esq.,
*Attorneys for Respondent*
*Downey Savings and*
*Loan Association*

## PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On August 18, 1987, I served the within Brief in Opposition to Petition for Writ of Certiorari in re: "The Ohio Casualty Insurance Company vs. Downey Savings and Loan Association" in the United States Supreme Court, October Term 1987, No. 87-159 on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Theodore B. Olson, Esq.
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Washington, D.C. 20037

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on August 18, 1987, at Los Angeles, California

CE CE MEDINA